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# CORPORATE GOVERNANCE SEX REGIMES: PERIPHERAL THOUGHTS FROM ACROSS THE ATLANTIC

Horatia Muir Watt\*

## ABSTRACT

The very recent and highly mediatized “Declaration of the 343 *Salauds*”<sup>1</sup>, where 343 (male) signatures in support of prostitution in a form designed to echo the highly significant declaration of as many women in 1971 in favor of the legalization of abortion, sheds particularly interesting light upon debate about sex regimes in connection with French law. France has recently introduced compulsory quotas for women in corporate boards<sup>2</sup>

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<sup>1</sup> Pierre Lénel et al., *Manifeste des 343: la réponse féministe ne suffit pas*, LE MONDE (Nov. 5th 2013), [http://www.lemonde.fr/idees/article/2013/11/05/manifeste-des-343-la-reponse-feministe-ne-suffit-pas\\_3506542\\_3232.html](http://www.lemonde.fr/idees/article/2013/11/05/manifeste-des-343-la-reponse-feministe-ne-suffit-pas_3506542_3232.html).

Le manifeste des 343 salauds’ paru dans l’édition de novembre de *Causeur* est un manifeste masculiniste, un manifeste de pacotille face à celui de 1971 où des femmes célèbres déclaraient avoir avorté à l’étranger dans des conditions sanitaires respectueuses de leur santé, au contraire de milliers de femmes mortes d’infections ou d’hémorragies après être passées dans les mains d’une faiseuse d’ange. Bien sûr, derrière ces manifestes, il est toujours question du corps des femmes, de la violence symbolique ou non qu’il peut subir... Pourtant ce manifeste des ‘salauds’, en raison même de sa radicalité, pourrait être enfin l’occasion de poser autrement le débat sur la prostitution qui depuis des décennies ressasse à l’envi les mêmes arguments. ‘*Touche pas à ma pute*’, doit bien être considéré comme une défense et illustration du patriarcat, le masculinisme étant la forme contemporaine que prend la défense de ce rapport social. Opposées à ce point de vue, des grandes figures du féminisme considèrent à raison que ce manifeste humilie les femmes, toutes les femmes. Mais dans le même mouvement, elles promeuvent le plus souvent un féminisme qui refuse de prendre au sérieux la parole de tous les acteurs, empêchent toute possibilité de débat serein sur cette affaire, en invoquant la dignité des femmes qui serait mise à mal.

<sup>2</sup> *Loi relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité profession-*

after imposing *la parité* for public appointments<sup>3</sup>. A comparative perspective, confronting this recent legislative development from across the Atlantic with policy views on affirmative action and philosophical conceptions of diversity in the United States, highlights the importance of the social, political or economic environment in which the issue of sex regimes arises as well as other forms of enforced diversity<sup>4</sup>. Moreover, the way in which the issues are framed (how are the stakes for women presented? what about other minorities?) and the salience they have in the public space (who reacts? with what political support?) reveals a variety of cultural idiosyncrasies or paradoxes on each side. This short paper will start by sketching out some of these issues in the form of a general approach (I). It will then look more closely at some of the tensions and contradictions within contemporary French feminist thought: first through Bourdieu's specific brand of social theory in *La Domination Masculine* (II), then in the writings of Elisabeth Badinter on *X Y Identité Masculine* (III).

#### I. INTRODUCTION: ON LEGAL COMPARISONS AND GOVERNANCE ISSUES.

When comparisons de-naturalize legal institutions by integrating context, surprising twists tend to surface<sup>5</sup>. In this re-

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*nelle*, Journal Officiel de la République Française (Jan. 27, 2011) available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023487662> Journal officiel. This text provides for the progressive introduction of quotas in order to ensure the increased presence of women in the corporate boards (but not the executive officers!) of publicly listed companies. Three years after the promulgation of this act, there will have to be twenty percent (20%) of women. Six (6) years after the same date, the quota increases to forty percent (40%) (and not fifty percent (50%)). Non-compliance leads to nullity of all appointments other than those of women, with additional financial sanctions. For the current state of further legislative proposals, see <http://www.gouvernement.fr/gouvernement/egalite-entre-les-femmes-et-les-hommes-0>.

<sup>3</sup> See, in particular, Law n° 2000-493 of June 6<sup>th</sup>, 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives.

<sup>4</sup> Here, comparative law serves to "de-naturalize" arguments, which may take on an entirely different slant when they appear in a similar debate elsewhere, revealing whole sets of unimagined alliances and outcomes.

<sup>5</sup> See GUNTER FRANKENBURG, ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE (Günter Frankenberg et al. eds., 2013).

spect, it must be remembered that the French society is both libertarian and intolerant, feudal and socialist, and elitist and egalitarian in ways that are specific or different from those in which contradictory strands combine across the Atlantic. French public opinion looks at, in admiration or bemusement, American political culture as a curious mixture, in which puritanical feminism appears to live side by side with the public celebration of the male politician's (or chief executive officer's) spouse. Inevitably, in each system, such tensions have significant consequences on public and private sex regimes, making any attempt at comparison extremely difficult.

Thus, in France today, while economic depression has induced a distinct turn to the right in respect of racial and immigration issues, feminism appears conversely to be undergoing a contemporary *renaissance* as class struggle<sup>6</sup> in a mode which may be more familiar to American sexual politics than previous stances of the French left intelligentsia on women's role in society<sup>7</sup>. In the meantime, equally paradoxically, dogged opposition to same-sex marriage from massively conservative middle-class constituencies, ultimately unsuccessful but divisive enough to unsettle François Hollande's Socialist government, is framed in "anthropological" terms which assign a distinctly reproductive and home-making role to the very wives and mothers who are to benefit from the new gender equality in the public and corporate spheres<sup>8</sup>.

But of course, as far as corporate boards are concerned, these diverse and complex approaches to the empowerment of women are only a part of the story. Similar cultural divides,

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<sup>6</sup> For some fascinating debate after the "Declaration of the 343 Salauds", see Lenel, *supra* note 1. However, "*Nous ne sommes pas là pour mener la guerre des sexes: nous avons la responsabilité historique d'accélérer sur notre route vers l'égalité*", declared the minister for the Rights of Women, Najat Vallaud-Belkacem when presenting the equality legislation, *Le projet de loi sur l'égalité hommes-femmes adopté au Sénat*, L'Express (Sept. 18, 2013), [http://www.lexpress.fr/actualite/politique/le-projet-de-loi-sur-l-egalite-hommes-femmes-adopte-au-senat\\_1282704.html](http://www.lexpress.fr/actualite/politique/le-projet-de-loi-sur-l-egalite-hommes-femmes-adopte-au-senat_1282704.html).

<sup>7</sup> Typically, great French figures of social theory have tended to be men who have ignored feminist issue (see the feminist collective, Danielle Chabaud-Rychter et al., *Sous les sciences sociales, le genre*, (La Découverte ed., 2010), in which the contributions of great male social theorists are discussed by contemporary feminists).

<sup>8</sup> This is the point of Elisabeth Badinter's anger. See ELISABETH BADINTER, *LE CONFLIT: LA FEMME ET LA MERE* (Flammarion ed., 2010) as we shall see below.

complete with unexpected turns, affect representations of capitalism itself, with subsequent impact on models and practices of corporate governance on each side of the Atlantic. For instance, France prides itself on the specificity of its social model and the rejection of a regulatory regime that places corporate profits above the interests of other stakeholders<sup>9</sup>. However, by contrast, more statist or social understanding of capitalism, its corporate elites tend to be linked by old-boy networks and show a remarkably low level of gender (10.5% women), ethnic and social (at a guess, far less) diversity, perhaps because of the traditional interoperability between the commercial and public service sectors at executive level<sup>10</sup>. One may wonder whether the split between official and unofficial discourse, which has been analyzed in judicial process<sup>11</sup>, is a more general phenomenon in the French legal or political sphere, or whether such contradictions are inherent to any complex liberal society.

Perhaps these contradictions are all the result of the predominant neoliberal fantasy that we can live in a competitive society without conflict<sup>12</sup>. In this light, the emergence of sex regimes in one form or the other throughout the capitalist world raises new questions about how and what work the law is doing within the broader realm of global governance. One may then wonder how the sudden presence of women will affect corporate capitalism across the board (will it subvert or consolidate?). Moreover, what are the less visible distributional consequences? Integrating women into corporate decision-making signifies that management will be driven by a dramatically expanded pool of energy and intelligence. Thus, will it co-opt women onto the side of capital, blurring the lines of gender differentiation and discrimination, and underscoring other sources of exclu-

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<sup>9</sup> The French model of the “social contract”, based on a (more) social understanding of corporate governance, along lines that are also generally more policy-implementing than market-induced, is at the heart of the “legal origins” debate according to which these characteristics put the French model at a comparative disadvantage in the global rankings of legal systems. See generally Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. OF ECON. LIT. 285 (2008).

<sup>10</sup> Both depend upon identical educational mechanisms of reproduction of élites as described by Bourdieu (on whose thought, see below) and are linked together through tight old-boy networks.

<sup>11</sup> Mitchel Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995).

<sup>12</sup> Ann Orford, Recognition conference, Paris Sorbonne 2012.

sion? How will the consequences of women quotas re-arrange existing majorities or impact upon indeed other excluded groups, and to whose benefit will they work, ultimately<sup>13</sup>? And will the empowerment of women induce a feminine solidarity comparable (for better or worse) with male network structures or will it work to reinforce socio-economic divides across genders as inequality increases?

In turn, it is also important to ask how the empowerment of women within capitalism affects ways of thinking about gender. How is the recognition of women's status within corporate boards changing the self- and social representation of women? In one sense, it will surely contribute to overcome the dogged (universal?) stereotype of women naturally endowed with insufficient authority (or brains?) to deal with corporate (or political?) issues. But there may also be greater resistance from a lightly less familiar source, which is the French public perception is that sitting on a corporate board is in some way "unfeminine"; the price of crossing gender lines is to have to dress unsexily in male-mimetic tailored suits<sup>14</sup>, or, alternatively, to have to act in a shark-like manner so as to become invisible in a man's world. There is of course however strikingly little reflection as to why male executive management has to harbor a uniform of dark suits and tie in the first place. At this point, Bourdieu may be a useful reference.

## II. BOURDIEU: CAPITAL AND HABITUS

In 1998, Pierre Bourdieu published *La Domination Masculine*. This opus was as controversial among feminists as it was influential<sup>15</sup>. According to Bourdieu, each individual acquires, through the process of socialization, a *habitus* of class<sup>16</sup>. The

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<sup>13</sup> It is interesting that the extreme right of ex-president Sarkozy's government (M. Jean-François Coppel) is associated with the initiative of the law on women quotas.

<sup>14</sup> The reference is of course to Duncan Kennedy's *Sexy Dressing*. SEXY DRESSING ETC., DUNCAN KENNEDY (1995).

<sup>15</sup> For the critique by Anne-Marie Devreux, see Anne-Marie Devreux, *Pierre Bourdieu et les rapports entre les sexes: une lucidité aveuglée*, in SOUS LES SCIENCES SOCIALES, LE GENRE 77 (2010). Her chapter inspires the content of the analysis here.

<sup>16</sup> PIERRE BOURDIEU, *LA DOMINATION MASCULINE* (2001). The social world is divided into fields of practice in which individuals are situated according to their capital resources, which may be economic, symbolic, esthetic or cultural.

*habitus* is composed of internalized schemes of intelligibility which tend to reproduce inequalities of symbolic, economic and cultural capital in various autonomous fields (professional, domestic, etc...) of social practice. Class is defined both by position in terms of capital and by an ethos shared (and internalized) by the group, which hinders access of outsiders and works against change. The particularly interesting point is that the domination of those who pursue the accumulation of various types of capital is sustained and legitimized by those who are excluded. Domination is a form of symbolic violence which requires the active (albeit unconscious) complicity of those who experience it and whose *habitus* imprisons them in denial.

*Habitus* implies an adhesion to the *doxa* of a given (social, professional, cultural) field. It is constructed through the combined effect of the rules of the game in that field and the "sedimentation" to which their repetitive play gives rise, mimetically or reflexively<sup>17</sup>. Since the *habitus* constructs the field of social practice and vice versa, the question has been raised by Judith Butler as to whether, in this conception, the subject exists before his or her encounter with the field, or whether is actually formed by social interactions determined by internalized *doxa* and repetitive practice. Moreover, she criticizes the concept of "field" as excessively static, to the extent that it is insufficiently attentive both to the instability of alliances between different forms of capital and to the transformative potential of subversive or queered practice<sup>18</sup>. At this point, the issue of the *habitus* of gender comes in. Does the feminization of the public space mean that a new, dissonant *habitus* emerges in the social world, heralding profound social change, or does gender work to strengthen existing divisions?

Whereas Bourdieu had previously remained largely indifferent to issues of gender in a large part of his work<sup>19</sup>, *La Dom-*

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<sup>17</sup> Judith Butler, *Performativity's Social Magic*, in BOURDIEU: A CRITICAL READER, 113-D28 (Richard Shusterman ed., 1999).

<sup>18</sup> Butler makes a similar critique of structuralist analysis of language.

<sup>19</sup> Gender had occupied a secondary ("auxiliary") role in the constitution of class according to Bourdieu. However, unlike the leading sociologists of his time, his own sociology had included the position of the mother in understanding of social reproduction of positions. he studies the "making" of Simone de Beauvoir as a statistical exception within the educational system. She is taken as an illustration of the internalization of the *doxa* of this field, through her own adhesion to the practices through which male cultural elites are reproduced. As an intellectual, she is seen as occupying a position among

*ination Masculine* marked the beginning of a significant debate with contemporary feminists on the symbolic violence of gendered class relationships and the role of women in the construction of (their own) subordination. The specific effect of symbolic violence according to Bourdieu is “enchanted submission”—a domination made to seem natural because the subordinate (women) have no access to knowledge other than that they share with the dominators (men). Indeed, men tend to possess (reflexively) a monopoly of the legitimate account of the ways in which society functions globally through “epistemological-political” learning processes, leaving women excluded from the circles of power and deprived of the “social expertise” necessary to accede to them. Enchantment means that they see no problem with this state of affairs, or, even better, rationalize it as a natural division of labor between the sexes.

The Bourdieusian concept of *habitus* and account of masculine domination are of obvious significance to the understanding why, despite remarkable progress in the past fifty years in terms of accession of women to education and training in a society such as France—where girls tend to succeed better than men in academic contexts<sup>20</sup>—, such women are still so few in spheres of both political and corporate power. To a large extent, it may well be, therefore, that enchantment is powerfully at work—to the point that many women “do not see the point” of sex regimes or judge them to be irrelevant; this may mean either that women feel perfectly at home with inequalities perceived as natural, or have no desire to achieve in a largely male world. In turn, this may explain why many women in France tend to perceive social and professional interaction between the

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the men, but separated from other women, and yet willingly dominated by Sartre himself, to whom she had “delegated her capacity to philosophize”. This analysis might of course be transposed today to in respect of the (still) rare women who have entered the circles of corporate capital. Interestingly, Bourdieu’s *habitus* has been “re-appropriated” more recently in conjunction with Beauvoir’s own concept of “situation”. T. Moi proposes to replace gender with the “lived body”, which links the physical experience of the body to its social-cultural context, allowing a repositioning of identities, for instance along the lines of the queer See *generally* SIMONE DE BEAUVOIR, *CONFLITS D’UNE INTELLECTUELLE* (1995). See also Devereux, *supra* note 15.

<sup>20</sup> Today, in an academic context, the humanities and social sciences are full of women. There is a sense (internalized by these fields...) however that these fields are somehow less demanding than the “hard” sciences. This is may be why the population of the selective *Grandes Ecoles* (maths or social-expertise based; or male network-run?) remains significantly male.



sexes in the United States as strained under the effect of radical feminist discourse. Be that as it may, beyond the literary field, in spheres of political and corporate power, French culture tends still to be significantly sexist and *élites* overwhelmingly male. This why many feminists, including Elisabeth Badinter, have conceded that quotas may be a “*mâle (mal) nécessaire*” in order to break the pattern of symbolic violence that seems to be ingrained in society to the detriment of (now highly educated, academically achieving) women. However, as we shall now see, this concession exacts a cost and must be replaced in the complex politics of intersectionality.

### III. BADINTER: SOCIO-BIOLOGICAL FICTIONS

It may not come as a complete surprise that one of France's most vocal feminists, Elisabeth Badinter<sup>21</sup>, has been fighting hard against imposed gender equality, whether in the public or corporate space<sup>22</sup>. She judges the regressive choice made by the current generation of young women to return to the home and full-time motherhood despite the remarkably high level of public child-care services, hard-won by previous generations of post-1968 feminists. She denounces the influence of “socio-biological fictions that reduce women to the status of female mammals”. Women should fight the “higher claims of womb”, rather than relying on state-enforced “parity”, which subtracts from the constitutional (“republican” which should read here as “democratic”) ideal of equality and universality to which she remains fundamentally attached. In Bourdieusian terms, she feels that current generations of women who have benefited from the education and opportunities for which their mothers fought so hard are now more than adequately equipped to escape the enchantment of male domination, and she cannot accept that they lack the desire to do so. Indeed, the persisting glass ceiling which appears to inhibit otherwise high-achieving

<sup>21</sup> See, e.g., ELISABETH BADINTER: *XY: DE L'IDENTITÉ MASCULINE* (1994).

<sup>22</sup> Jane Kramer, *Against Nature: Elisabeth Badinter's Contrarian Feminism*, THE NEW YORKER, July 25, 2011, at 44. Enforced male-female parity on electoral lists? Badinter fought against it. The so-called burqa ban? She lobbied for months to see it passed. Badinter is convinced that young Frenchwomen have been undermining their hard-won claims to equality. She believes that, in the name of “difference,” young women are falling victim to sociobiological fictions that reduce them to the status of female mammals, programmed to the “higher claims” of womb and breast ».

women from acceding to equal positions in the public and private space remains an enigma from this perspective. But of course, the situation is more complex than it appears at first glance, as Badinter's own positions reveal.

Her own critique of "motherhood fundamentalism" is resented by the younger generation and criticized in turn for passing judgment on the lives of ordinary women from the comfortable remove of class privilege.<sup>23</sup> In turning to the satisfactions of the home and away from supposedly liberating career opportunities, such women claim to be rejecting the diktats of the workplace which enslaved their mothers, rather than conceding male superiority in the professional world. In other words, the new stance on the part of women may be as much a political protest against the de-humanizing effects of capitalism at all levels than the stigma of an outgrown *habitus* of subordination. Badinter may also underestimate the way in which the sex struggle is now experienced in the wake of the financial crisis as class warfare. In this perspective, the immediate problem to be tackled is the unequal distribution of the economic consequences of the current waves of financial crisis on women's pay and status. From her remote academic tower, she may now be too far removed from such difficulties for her voice to remain credible in the current chaos.

Moreover, when issues of gender equality cross other questions raised by diversity, the political lines of the debate become confused. While Badinter proclaims that sex is beyond ideology<sup>24</sup>, it is clear for all that the claim to the public expression of difference<sup>25</sup> is now taken up by burqa-clad women in the street under the double aegis of gender and religion. Such an intersection immediately raises new difficulties for a political community that has been structured at the core by universality

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<sup>23</sup> *Id.* "Le Conflit: La Femme et la Mère," a scathing dissection of what she regards as a spreading cult of "motherhood fundamentalism" in the West. Badinter is a woman revered by her followers and rebuked by her critics for the same reason.

<sup>24</sup> Interview by Thenard Jean-Michel with Elisabeth Badinter, *Libération*, ("Pour Elisabeth Badinter, la parité n'est ni de droite ni de gauche. «C'est une affaire de philosophie»"), available at <http://www.liberation.fr/evenement/1998/06/18/un-mauvais-coup-porte-a-la-republique-elisabeth-badinter-denonce-un-faux-progres> (last visited Mar. 4, 2013).

<sup>25</sup> This issue is framed somewhat counter-intuitively as a right to "privacy" under article 8 ECHR. European Convention On Human Rights, art. 8, Sept. 13, 1953, 213 U.N.T.S. 222.

and laicity, and yet has to face the difficulties of its own colonial heritage in terms of cultural difference, underscored by the social and economic exclusion of immigrant communities whose unsuccessful struggle to integrate has led to widespread rejection of the “republican/democratic” values which Badinter champions. Her violent dismissal of burqa-bearing women as “pathologically ill”<sup>26</sup> is hardly helpful. Moreover, her recent sweeping condemnation of surrogacy arrangements, which clearly impacts unequally on access to parenthood of (male) same-sex couples, is equally controversial. While the exploitative dimension of the third world surrogacy market is yet again a real problem, one may wonder whether such womb-renters, wearers of veils, and new corporate board-members all belong, as it were, in the same deluded metaphorical boat?

How should one interpret the fact that similar causes (against quotas, surrogacy and veils) are now championed by the leader - a woman - of the rising party of the extreme right, the *Front National*, who replaced (or overthrew) her own father at its prow despite the unfavorable odds of the (public, electoral) sex regime?<sup>27</sup> And where, in all this controversy over gender equality, is any concern for racial minorities, or more specifically, the conceptual complexities of discrimination? Where indeed does sexual orientation fit, when the legalization of same-sex marriage divided society from top to bottom, pushing even the economic crisis to the back of the scene? It seems to me that this rise – or the increased vocality - of the extreme right, which is a trans-European phenomenon rather than specifically French, is the most immediate cause for alarm to the extent that it involves, potentially, the whole spectrum of difference in the shadow of still triumphant financierized capitalism.

In light of these facts, the issue of corporate quotas for

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<sup>26</sup> La Burqa, Ou La Paranoia Des Relations Hommes-Femmes [The Burqa, Or Paranoia Of Gender Relations], LES BLOGS (July 13, 2009), <http://hommelibre.blog.tdg.ch/archive/2009/07/13/la-burqa-ou-la-paranoia-des-relations-hommes-femmes.html>.

<sup>27</sup> On Marine Le Pen, leader of the National Front party, who denies that this party is “extreme right”, see Abel Mestre, Pour Marine Le Pen, Hollande doit “Dissoudre L’Assemblée Nationale [For Marine Le Pen, Hollande Must “Dissolve the National Assembly], LE MONDE (Nov. 17, 2013, 6:28 PM), [http://www.lemonde.fr/politique/article/2013/11/17/pour-marine-le-pen-hollande-doit-dissoudre-l-assemblee-nationale\\_3515235\\_823448.html](http://www.lemonde.fr/politique/article/2013/11/17/pour-marine-le-pen-hollande-doit-dissoudre-l-assemblee-nationale_3515235_823448.html).

women might seem relatively trivial. I believe that they are not and I support any move to enforce gender equality that is still, for highly complex reasons, held back. However, such a move can only be deemed a success, it seems to me, if it serves two other purposes. On the one hand, it should herald the acceptance of other forms of diversity in one of the most powerful strongholds of non-difference and on the other hand, the renewal of the composition of corporate boards should serve as a starting point for rethinking the ways in which corporate capitalism works to make its strategic investment decisions, with effects on the labor market, environment, and the respect of individual and collective human rights. In other words, this is the point at which conceptions of equality in the composition of corporate boards tie intimately into fundamental issues of global economic governance.